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THE FEDERAL JUDICIARY: AN ANALYSIS OF PROPOSED REVISIONS†

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THE allegation that the federal courts, following the dicta of Chief Justice Marshall, usurped the power to review the constitutionality of state and national legislation, has little support in this day and age, since the exercise of that power for more than a century has not only established its reality but has also facilitated in some respects the steady growth of the constitution required by the trends in the growth and development of the nation.¹ In the course of this interpretative genesis of the organic law the courts have suffered little criticism for upholding the validity of laws; protests have arisen when laws sponsored by a section or a class have been annulled. As long as these attacks upon the courts were sponsored now and then by disaffected minorities, no plan of revision stood much chance of acceptance;² but if several minority groups should be aroused at once and act in unison, the courts might no longer escape with their prerogative intact. Consequent-

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¹The genesis of the doctrine of judicial review is described in the following books and articles: Corwin, *Judicial Review*, 8 *Encyc. Soc. Sciences* 457-62; Dougherty, *Power of Federal Judiciary Over Federal Legislation*; Haines, *American Doctrine of Judicial Supremacy*; Merriam, *American Political Ideas 1865-1917*; Orth and Cushman, *American National Government*; Ralston, *Study and Report for the A. F. of L. (Pamphlet, 1932)*; Warren, *The Supreme Court in United States History*.

²Criticism in the past has largely been "opportunistic, arising out of some specific decision." Orth and Cushman, *American National Government* 568; Merriam, *American Political Ideas 1865-1917*, p. 188. A brief account of past attacks upon the Court is available in Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230. There is a fairly comprehensive bibliography in Ettrude, *The Power of Congress to Nullify Supreme Court Decisions*.

ly the list of congressional acts held unconstitutional by the Supreme Court suggests that the critical hour may be at hand. Of the seventy laws annulled to June, 1935, nineteen were invalidated in the decade of 1920 to 1930; and the present decade promises even to exceed that record, for ten laws were rejected in the first half of it. Of these seventy unfavorable opinions, ten were rendered by a five-to-four vote.³ This need not mean that the Court was always wrong and Congress right, but it merely indicates that the once popular growth of national powers by judicial interpretation is now being checked to an extent that affects the interests of a larger proportion of the American people.

The actual number of laws stricken down is really less significant than the alleged effect of the practice on legislative objectives and processes. Prior to 1880 the attacks upon the Supreme Court grew largely from sectional interests;⁴ but in 1888 the Court began resorting to the "due process" clauses to free business from regulation.⁵ Because acts were held unconstitutional in only six of ninety-eight cases involving "due process" prior to 1912, in only seven of ninety-seven cases in 1913 to 1920, but in fifteen of fifty-three cases in 1920 to 1930, Frankfurter has concluded that this revealed a "destructive tendency."⁶ Corwin has added that only a few other clauses in the organic law have furnished the

³The prepared lists of unconstitutional legislation do not agree in detail because of the problem of interpreting the effect of opinions on some complex issues. The figures given above are from an editorial in *United States News*, June 10, 1935, p. 1. In 1923 Warren listed sixty laws of Congress that had been held unconstitutional (cited in Orth and Cushman, *American National Government* 561), while Ralston, writing at about the same time, found fifty-two (Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), Appendix A), and Haines listed sixty in 1932 (Haines, *American Doctrine of Judicial Supremacy* 541-66). Also, compare the list in (1937) 4 West Pub. Co. Docket 3863-71, in which only fifty-eight cases are included to date, of which only twelve were in the twenties and four in the first half of the thirties. In 1912 B. F. Moore found that 185 federal statutes had been upheld as against 33 annulled, while 646 state laws had been approved and 223 rejected. Of the 33 negative opinions, he found that 7 were based upon a disturbance of the functioning of the three branches of the government, 12 upon encroachments on states' rights, 11 upon violations of individual liberties, and 6 upon miscellaneous grounds. Moore, *The Supreme Court and Unconstitutional Legislation* 77-130.

⁴See footnote 2.

⁵In 1882 Roscoe Conkling testified before the Court that the "due process" clause had originally been inserted in the fourteenth amendment to protect property rights as well as the negro; and in the *Pembina Mining Case* of 1888 the Court defined "persons" in the amendment to include corporations. Hacker and Kendrick, *The United States Since 1865*, p. 198.

⁶Frankfurter, *The Supreme Court and the Public*, (1930) 83 *Forum* 333.

basis for judicial review, as contrasted with the frequency of resort to the "due process" clauses in the fifth and fourteenth amendments, with the result that the "higher law" protected by the Court is really the code of American business today; i.e., "the freedom of individual enterprise . . . , and the unrestricted flow commerce throughout the country."⁷ Merriam and Goodnow have protested that the courts tend to support the political and economic policies of Big Business by rejecting as violative of "individual liberties" or "due process" many well-considered plans to resolve the problems of modern urbanized and industrialized society.⁸ As a result, Merriam found labor to be most distrustful of the power of the courts, the middle class wavering, and the employers quite pleased.⁹

Since the courts generally have followed the rule of precedent, a judicial decision in a crucial case has determined to a great extent the future course of courts and legislature. One momentous opinion each on income taxes, child labor, minimum wages, railway rate-making, and New Deal policies not only served to wreck the law and the administrative set-up in question but also to make difficult a whole legislative program of the type invalidated.¹⁰ It is charged, then, that the courts have in a sense become a third legislative chamber, but that they act after the fact.¹¹ For example, the NRA annulment came after the Act had been administered for two years; and then the unanticipated strict construction in that case played havoc with the legislative program of Congress, for a half dozen more statutes that were being drawn or administered then appeared to be unconstitutional.¹² Furthermore, the legislature excuses itself for drawing doubtful laws by recourse to the contention that the courts, by placing emphasis first here and there

⁷Corwin, *Judicial Review*, 8 *Encyc. Soc. Sciences* 462.

⁸Merriam, *American Political Ideas 1865-1917*, at pp. 151, 158-69, 176; Goodnow, *Social Reform and the Constitution* 332. Compare Coker, *Recent Political Thought* 360; Roe, *Our Judicial Oligarchy* passim; and editorial, *New Republic*, June 12, 1935, at p. 118.

⁹Merriam, *American Political Ideas 1865-1917*, at p. 177. A more severe denunciation is that of Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932) p. 40.

¹⁰See Buell, *Reforming the Supreme Court*, (1922) 114 *Nation* 715.

¹¹President Roosevelt's radio address, March 9, 1937. Moore listed twelve cases (to 1912) that had "hampered Congress in the solution of pressing social and economic problems." Moore, *The Supreme Court and Unconstitutional Legislation* 85-102. See also the scathing editorial, *New Republic*, June 12, 1935, at p. 118.

¹²See *The National Whirligig* (Washington news comments) in Muncie, Ind., *Evening Press*, June 5, 1935, and in other newspapers subscribing to that syndicated column.

among precedents and powers, have followed a contradictory course rather than laid down a clear pattern of rules to guide the law-makers.¹³ For example, the interstate commerce clause has been expanded to permit injunctions against labor in almost any circumstance, but has been more strictly construed to invalidate child labor laws and other social legislation.¹⁴

On the other hand, those who support the power of the courts to weigh the constitutionality of legislation have a number of strong defensive arguments; but these principles are well known and generally accepted, so an enumeration of them would be trite.¹⁵ Rather, the purpose here is to indicate that the present effort to "modernize" the federal judiciary has come as a climax in a period in which many statutes embodying the means to social and economic objectives sought by an elected President and Congress have been invalidated because federal judges, charged by their critics with prejudice for once-prevalent laissez-faire, have found these laws and their objectives in conflict with a few clauses in the constitution—clauses that according to some legal scholars have been expanded and then contracted and have been excessively dwelt upon. Consequently, from January, 1935, to January, 1936, twenty-four bills and resolutions seeking revisions of the power or procedure of the federal judiciary were introduced in Congress.¹⁶ Finally, in February, 1937, President Roosevelt undertook to coordinate and lead this attack on the judiciary by presenting to Congress a reform program embodying parts of several plans previously offered.¹⁷ In view of the widespread debate and conjecture

¹³Clark, *The Supreme Court and the N. R. A.*, *New Republic*, June 12, 1935, at p. 122; Buell, *Reforming the Supreme Court*, (1922) 114 *Nation* 714.

¹⁴Merriam, *American Political Ideas 1865-1917*, p. 207.

¹⁵Examples of the classical historical defense are: Emery, *Concerning Justice*; Dougherty, *Power of Federal Judiciary over Federal Legislation*; and Hatcher, *The Power of the Federal Courts to Declare Acts of Congress Unconstitutional*, (1936) 22 *A. B. A. J.* 163-7. See also Coxe, *An Essay on Judicial Power and Unconstitutional Legislation*; Borah, *American Problems* ch. xv; Haines, *American Doctrine of Judicial Supremacy* 480; Otis, *It Can Be Done*, *United States News*, Feb. 10, 1936, p. 3; Sutherland, Shields and Dawes, quoted (June, 1923) in 2 *Cong. Digest* 271, 273, 275; Laski, *Judiciary*, 8 *Encyc. Soc. Sciences* 465; Moore, *The Supreme Court and Unconstitutional Legislation* 77-85; Senator Lewis, (1935) 79 *Cong. Rec.* 8297; Taft, *The Recall of Decisions* (Pamphlet, 1913) pp. 4, 9, 23; Taft, *Arizona Veto*, (1911) 47 *Cong. Rec.* 3964; 1 Warren, *The Supreme Court in United States History* 29; What Mr. Hughes and Mr. Stone Once Said, *United States News*, Feb. 17, 1936, p. 3; Wilcox, *Government by All the People* 213; et passim.

¹⁶S. J. R. 3, 15, 149; S. R. 98, S. 3211, 3787; H. J. R. 34, 277, 287, 296, 301, 317, 329, 344, 374; H. R. 7997, 8054, 8100, 8123, 8168, 8309, 9478, 10128, 10196—74th Cong. 1st and 2nd Sessions, Jan. 3, 1935 to Jan. 15, 1936.

¹⁷*Kansas City Star*, Feb. 5, 1937.

provoked by this proposal, it is pertinent to consider the tried and suggested proposals of the past and present and to compare their merits and faults.

THE PROPOSALS: MAKE THE BEST OF THE EXISTING SYSTEM

The more conservative reformers would not modify judicial review of constitutionality but would try to adjust the existing plan to meet modern needs. In the first place, some offer the reminder that the constitution has an amending clause. The adoption of the twenty-first amendment in ten months is cited as a demonstration that the electorate can readily change the organic law if it wishes to do so.¹⁸ Those who have insisted that the constitution is not easily amended¹⁹ would reply that the twenty-first amendment was adopted in a time of frenzied, irrational action, just as was the eighteenth, that it required eighteen years and a nation-wide campaign to add the sixteenth, and that the rule of difficult amendment still prevails when sufficient vested interests are at stake.²⁰ Most American state constitutions²¹ and many European constitutions are more facile of amendment than the constitution of the United States: for example, in Switzerland a popular majority, provided it carries also a majority of the cantons, may effect an amendment.²² And now proposed amendments to the federal constitution requiring submission of future amendments to a popular vote are in the hands of House and Senate judiciary committees.²³

Others in the conservative group hold that the courts have generally shown a reasonable responsiveness to public opinion, so, in the words of Goodnow,

"Our only recourse is a persistent criticism of those of their

¹⁸See *The Pathfinder*, June 15, 1935, p. 1.

¹⁹Especially President Theodore Roosevelt, quoted in Merriam, *American Political Ideas 1865-1917*, p. 189; and Woodrow Wilson, who once wrote that it required a near revolution to "move the cumbrous machinery of formal amendment." Cushman, *Amendment, Constitutional*, 2 *Encyc. Soc. Sciences* 22. Also, President Franklin D. Roosevelt, in his radio address, March 9, 1937.

²⁰For example, the inception of the drive to eliminate child labor by national regulation antedates the World War, and the proposed amendment launched in 1924 has received the ratification of only approximately 30 states in 13 years. Trimble, *The Child Labor Problem*, (1937) 3 *University Review* 208-211.

²¹Haines says that the state constitutions should be easily amended, however, for many are in reality collections of statutes. Haines, *American Doctrine of Judicial Supremacy* 487.

²²Cushman, *Amendment, Constitutional*, 2 *Encyc. Soc. Sciences*, p. 22.

²³S. J. R. 15, 186, S. 198, H. J. R. 34 (1935) 79 *Cong. Rec. Index Volume*.

decisions which evince a tendency to regard the constitution as a document to be given the same meaning at all times and under all conditions. . . ."²⁴

This recommendation is also expanded by some to mean a public and "scrupulous examination" of all nominees for the Supreme Court,²⁵ while Laski would prefer that the examination and confirmation be made by an advisory body, a small professional group, serving for a long term and free from executive control.²⁶ Frankfurter and Pound would remedy matters by improving upon the training given lawyers, since judges are of that profession. Thus the prospective candidates for the bench would receive a thorough grounding in social and economic problems as well as in the law, and as a result the courts would become a "bureau of social justice," with logic relegated to its proper position as a mere instrument.²⁷

Finally two parts of President Roosevelt's proposal belong in this category. To appoint more federal judges and to assign them, under the direction of a proctor, to the circuit and district courts where the dockets are crowded is a conservative answer to only one criticism of the federal courts—that justice is too slow and expensive.²⁸ Debate over this plan seems to revolve around the question whether the federal courts are actually congested with pending litigation.²⁹ Another part of the president's reform would extend to the Supreme Court the privilege of retiring on pension, an inducement that has long been available to other federal judges, and it would also attempt to encourage or force retirement of all federal judges at seventy by the appointment of an additional

²⁴Goodnow, *Social Reform and the Constitution* 357. Also, Orth and Cushman, *American National Government* at pp. 570, 571; Wormser, *Court Reform a Job for Laymen*, (1932) 134 *Nation* 224, 225.

²⁵The Supreme Court Under Fire, (1930) 62 *New Republic* 30, 31; Moore, *The Supreme Court and Unconstitutional Legislation* 77-130.

²⁶Laski, *Judiciary*, 8 *Encyc. Soc. Sciences* 465.

²⁷Pound, *Introduction, Supreme Court and Minimum Wage Legislation*, also quoted in Merriam, *American Political Ideas 1865-1917*, at pp. 181, 182. Merriam lends his support (p. 204) and so does Coker, *Recent Political Thought* 368, 369, while Frankfurter and Richter have reached similar conclusions. Frankfurter, *The Supreme Court and the Public*, (1930) 83 *Forum* 333; Richter, *A Legislative Curb on the Judiciary*, (1913) 21 *J. Pol. Econ.* 281-95.

²⁸*Moves on Supreme Court, and Full Text of Proposed Law*, *Kansas City Star*, Feb. 5, 1937.

²⁹Cummings, *Cites the Law's Delay*, *Kansas City Star*, Feb. 5, 1937; *Not as a Dictator*, *Kansas City Times*, Feb. 15, 1937; Lawrence, *Refute a Court Charge*, *Kansas City Star*, Feb. 16, 1937; Otis, *Camouflage, or the President's Message and the Supreme Court* (Pamphlet, 1937). Members of the American Bar Association voted 2 to 1 in favor of this reorganization of the federal courts. *Kansas City Times*, March 12, 1937, p. 6.

justice either to aid or nullify the work of those who refused to step aside and make way for the "infusion of new blood."³⁰ Although the fixing of an arbitrary age of retirement is unfair to many men who are still "young" at seventy or eighty, that plan has been generally adopted as the only satisfactory way of meeting a similar problem in the army, in some industries, in the Civil Service, and in many universities. Consequently this attempt to "modernize" the judiciary probably would have been received with much less adverse criticism had it been divorced from the suspicion that under present circumstances it was merely an ingenious method of "packing" the supreme tribunal.³¹ Excepting that contingency,³² this move is essentially sound and conservative, especially when compared with many other suggestions that have been offered.³³ Furthermore, it is generally conceded that it is clearly within the power of Congress to enact all parts of the president's proposal, for Congress has the constitutional authority to control the size of the federal judiciary and to regulate its appellate jurisdiction.³⁴

The chief merit of these proposals is that on the whole they recognize the value of judicial review and offer mild means for remedying its deficiencies. At the same time they are subject to the shortcoming that they lack the support of the more radical camp, which contends that the power of the courts has advanced to a stage where it is impregnable to moderate appeals and that by preserving the complete independence of the judiciary these plans contain the germ that would ultimately defeat their respective purposes. Considered separately, all three of these approaches

³⁰Moves on Supreme Court, and Full Text of Proposed Law, *Kansas City Star*, Feb. 5, 1937.

³¹President Roosevelt's radio address, March 9, 1937. *Court Debate at Church*, *Kansas City Times*, Feb. 15, 1937; *A Halter on Court*, *Kansas City Times*, Feb. 22, 1937; *Court Issue Hazy*, *Kansas City Star*, Feb. 22, 1937; *Otis, Camouflage, or the President's Message and the Supreme Court* (Pamphlet, 1937).

³²This and other proposals to "pack" the Court are considered further at p. 496, *infra*.

³³The American Bar Association approved retirement privileges for the Supreme Court by nearly 5 to 1. *Kansas City Times*, March 12, 1937, p. 6.

³⁴"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make." (secs. 1 and 2, art. III, constitution of the United States). Also see the testimony of Attorney-General Cummings and Judge Devaney, reported in *Kansas City Star*, Mar. 10 and 12, 1937; *The Pathfinder*, Feb. 20, 1937, pp. 3, 4, 14; and other current news, *passim*.

have commendable features. Persistent criticism of the courts and extensive provision of broader legal training would doubtless have some effect in time, and uniform retirement of federal judges, on pension, is acceptable per se. Popular, easier amendment, especially if patterned after the Swiss plan, is sufficiently conservative in that it would not disturb judicial functioning, and at the same time it offers an ultimate means by which the facilities for keeping the organic law abreast of contemporary need and popular desire could be improved if meanwhile all other means should fail or be rejected.

THAT ADVISORY OPINIONS SHOULD BE REQUIRED

Ever since President Washington sought and was refused the advice of the Supreme Court, it has been the established practice of the federal courts to refrain from rendering abstract advisory opinions on the ground that the organic law gave them jurisdiction only in "cases or controversies."³⁵ Further objectionable aspects are that the courts desire to look at the administration of an act as well as its content to determine its intent, and that only in the hearing of an actual case are all relevant facts and arguments likely to be unearthed.³⁶ However, by 1929 twelve states had provided that their supreme courts, upon request of the executive or the legislature, should render advisory opinions on pending proposals, but in only two states are these opinions binding.³⁷ Nevertheless, it appears that experience in the states is so narrowly restricted as to justify only qualified conclusions as to the probable favorable results if binding advisory opinions were extensively sought of the Supreme Court.³⁸ Timeliness of action might be offset by the objectionable features.

³⁵See 1 Warren, *The Supreme Court in United States History*, at pp. 108-111. The recent rendering of a "declaratory judgment" by the Supreme Court may mean that the Court would now also hand down abstract advisory opinions if asked, but the two procedures are not identical. Cushman, *Constitutional Law in 1932-33* (1934) 28 *Am. Pol. Sci. Rev.* 47, 48. And see further, as to the recent Federal Declaratory Judgment Act, the Note (1935) 21 *St. Louis L. Rev.* 49, 67.

³⁶See Murray, *Has the Colorado I. R. A. Met an Advisory Death?* (1936) 8 *Rocky Mt. L. Rev.* 141, 142; and bibliography in Robinson, *Limitations Upon Legislative Inquiries Under Colorado Advisory Opinion Clause*, (1932) 4 *Rocky Mt. L. Rev.* 237, n. 1.

³⁷Willoughby, *Principles of Judicial Administration* 86; Murray, *Has the Colorado I. R. A. Met an Advisory Death?* (1936) 8 *Rocky Mt. L. Rev.* 141, n. 36.

³⁸Ellingwood found that 410 opinions in 8 states to 1918 were received with full deference (cited in Willoughby, *Principles of Judicial Administration* 86, 87), but Robinson has ably reviewed the limitations upon resort

Since the annulment of the NRA after the Act had been administered two years called attention to this clearly undesirable delay, four resolutions were then introduced in Congress proposing to require advisory opinions of the Supreme Court.³⁹ Simultaneously compromise plans were offered whereby the advantages in hearing an actual case would not be entirely sacrificed to gain promptness of decision. These were embodied in two congressional measures that would provide for direct or immediate review by requiring the Supreme Court to give precedence at once to cases appealed from courts of first instance because of constitutional issues.⁴⁰ Then, in 1937, this was included among the reform measures advocated by President Roosevelt.⁴¹ Since enactment of this proposal is within the constitutional authority of Congress,⁴² and since it pursues a middle path between abstract advisory opinions and present practice, it offers an immediate and conservative means of expediting justice;⁴³ but even so, it alone would not eliminate five-to-four decisions and other faults charged to existing practice by critics of the courts.

THAT JUDGES SHOULD BE ELECTED BY THE PEOPLE

If the judiciary is supposed to be truly coordinate with the other two branches of government, then, by logic, it should be responsible to the electorate like the others. This was true in most states, so it was an inevitable result of the twentieth century movement for more responsive government that the popular election of federal judges, for a definite term, should be included in the program of reformers. In 1914 a nine-district plan was proposed for the election of the nine justices of the Supreme Court, while district and circuit judges would have been responsible to the territory they served.⁴⁴ The Socialist platform of 1920 and

to the practice as defined by the court in *Colorado. Robinson, Limitations Upon Legislative Inquiries Under Colorado Advisory Opinion Clause*, (1932) 4 *Rocky Mt. L. Rev.* 237-50.

³⁹H. J. R. 317, 344, 374, H. R. 8309, 74th Cong. 1st Sess. There was also included in Senator Norris's resolution (S.J.R. 149) a requirement that the Court act within six months if it was to declare a law unconstitutional; but a litigant might purposely delay appeal by resort to technicalities, hence this resolution in effect might also require advisory opinions if the Court were to act at all. See the editorial, in *Boulder, Colo. Daily Camera*, June 18, 1935.

⁴⁰S. 3211, H. R. 8054, 74th Cong. 1st Sess.

⁴¹Moves on Supreme Court, and Full Text of Proposed Law, *Kansas City Star*, Feb. 5, 1937.

⁴²Requirement of direct review would be clearly a regulation of appellate jurisdiction (sec. 2, art. III, constitution of the United States).

⁴³The American Bar Association voted 2 to 1 for direct appeal. *Kansas City Times*, Mar. 12, 1937, p. 6.

LaFollette's of 1924 contained clauses favoring the election of federal judges, in the latter case by direct vote and for ten-year terms.⁴⁵

Advocates of this plan claim that it would make the judiciary properly responsible to the people they are supposed to serve,⁴⁶ that it has worked well in the states⁴⁷ and in Switzerland,⁴⁸ and that even if it would make judges stoop to participation in election campaigns, it would be less disgraceful for them to do that than to undergo an attack like that of the Senate on Mr. Justice Hughes in 1930.⁴⁹ One of the strong points against this panacea is the contention that the people are "incapable of passing judgment upon the technical and professional attainments of judicial candidates."⁵⁰ The opponents also claim that state practice of this plan has resulted in the election of incapable men;⁵¹ that it involves the judges in party and machine politics;⁵² and that this in turn eliminates men who do not care to risk their reputation for a political office⁵³ and also is not conducive to the independence of mind of successful candidates, for they must soon seek re-election.⁵⁴ Laski lightly brushed aside the claim for success in Switzerland by the clever rejoinder that "success in lottery is not an argument for lotteries. . . ."⁵⁵ The most valid of all the unfavorable arguments is based on the fact that in the states, where the judges are elected, they have annulled legislative acts no less frequently than the Supreme Court.⁵⁶ As Ralston said, "Fear of accountability has meant little to them."⁵⁷ Hence we may conclude that extension of this plan to include federal judges would

⁴⁴Clark, Government by Judges, Sen. Doc. No. 610, 63rd Cong. 2nd Sess., ser. 6596 (1914).

⁴⁵Porter, National Party Platforms, pp. 471, 519.

⁴⁶Clark, Government by Judges, Sen. Doc. No. 610, 63rd Cong. 2nd Sess., ser. 6596 (1914).

⁴⁷Clark, Government by Judges, Sen. Doc. No. 610, 63rd Cong. 2nd Sess., ser. 6596 (1914).

⁴⁸Laski, Judiciary, 8 Encyc. Soc. Sciences 466.

⁴⁹When Secrecy is Best, (1930) 59 World's Work 22.

⁵⁰Orth and Cushman, American National Government 497; Laski, Judiciary, 8 Encyc. Soc. Sciences, p. 466.

⁵¹Buell, Reforming the Supreme Court, (1922) 114 Nation 715.

⁵²Orth and Cushman, American National Government 497.

⁵³Orth and Cushman, American National Government 497.

⁵⁴Laski, Judiciary, 8 Encyc. Soc. Sciences 466.

⁵⁵Laski, Judiciary, 8 Encyc. Soc. Sciences 466.

⁵⁶Ralston, Study and Report for the A. F. of L. (Pamphlet 1932), Appendix B.

⁵⁷Ralston, Study and Report for the A. F. of L. (Pamphlet 1932), p. 69.

likewise fail to have the desired effect, and still other means of checking the courts would be sought.

THAT UNPOPULAR JUDGES SHOULD BE IMPEACHED OR RECALLED

The constitution provides that federal judges shall hold their office "during good behavior."⁵⁸ Since what constitutes "good behavior" is not defined, President Jefferson, who faced a judiciary packed with Federalists, proposed that a judge should be impeached if he failed to defend one of his criticized opinions to the satisfaction of Congress.⁵⁹ This agitation came to a climax in the proceedings against Mr. Justice Chase, but the necessary two-thirds vote was lacking in the Senate;⁶⁰ thereafter it has generally been conceded that federal judges should be impeached only upon charges of misdemeanor.⁶¹

The recall of federal office-holders was discussed in the constitutional convention; but the idea did not make impressive headway until long after the impeachment movement had collapsed, and then the recall was included, along with the initiative and referendum, in the popular movement of the present century.⁶² In the states that adopted the recall it usually applied only to administrative officers, but nine states also included provision for the recall of their judges.⁶³ Then the Socialists incorporated in their platform a statement favoring the recall of federal judges, and organized labor lent its support.⁶⁴ However, the only trial to

⁵⁸Art. III, sec. 1.

⁵⁹Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230; Orth and Cushman, *American National Government* 568.

⁶⁰Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230; Orth and Cushman, *American National Government* 568.

⁶¹Nevertheless, Jefferson's proposal has been revived recently. Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), at p. 70; and H. J. R. 301, 74th Cong. 1st Sess. (1935). See also Otis, *McAdoo Versus the Judges*, (1936) 5 *Kan. City L. Rev.* 1.

⁶²Bird, *Recall*, 13 *Encyc. Soc. Sciences* 147; Munro, *The Initiative, Referendum, and Recall* 88.

⁶³The American Bar Association opposed this movement. President Taft vetoed the resolution to admit Arizona until the recall of judges was erased from the state constitution; but Arizona reenacted the provision after admission as a state. In Arkansas the recall statute was set aside by the court. Merriam, *American Political Ideas 1865-1917*, pp. 194, 195; Wilcox, *Government By All the People* 213; Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), pp. 68, 69; Clark, *Government by Judges*, Sen. Doc. No. 610, 63rd Cong. 2nd Sess. ser. no. 6596 (1914) at p. 72.

⁶⁴Porter, *National Party Platforms* 471; Merriam, *American Political Ideas 1865-1917*, p. 193. In 1922 Frear of Wisconsin introduced in Congress a proposed amendment to the Constitution which included the recall for the federal judiciary. Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 72; 2 *Cong. Digest* 271.

date has been that of the few states that were receptive to the suggestion.

Advocates of this panacea claim that it is a useful device for calling judges to task after rendering unpopular opinions in cases involving economic issues;⁶⁵ that it makes all three departments equal in fact as well as in theory;⁶⁶ that it has been sparingly used in those states that have it;⁶⁷ and that the old way was bad, so this would surely be an improvement, even if not perfect,⁶⁸ for "it would be better to have a just judge recalled than to have a just law . . . unjustly wiped off the statute books."⁶⁹ Opponents contend that the judiciary, instead of being independent, would be subject to the "popular passion" of "temporary majorities."⁷⁰ They point out that judges would then be under pressure to ignore the rights of minorities or the property interests of entrenched upper classes,⁷¹ that they would be subservient to party bosses,⁷² and that they might even be recalled for exercising their legitimate function without having avoided laws on grounds of unconstitutionality.⁷³

Any provision limiting the tenure of federal judges could be effected only by constitutional amendment, for the courts themselves would probably find an impeachment or recall statute to be in conflict with the "good behaviour" clause in the organic law.⁷⁴ Removal of judges by either method would also come after the fact; it would not destroy the decisions that led to the recall of the judges who made them, and it would not prevent future courts from making like decisions.⁷⁵ In California and Oregon the recall has seldom been used against judges, and then because of moral or procedural laxity rather than decisions affecting constitutional issues.⁷⁶ Consequently Barnett, who studied the effect of the pro-

⁶⁵Bird and Ryan, *The Recall of Public Officers . . . in California* 14.

⁶⁶Martin, *The Veto and the Recall* (Pamphlet, 1911), p. 4.

⁶⁷Bird and Ryan, *The Recall of Public Officers . . . in California* 347.

⁶⁸Wilcox, *Government By All the People* vii.

⁶⁹Martin, *The Veto and the Recall* (Pamphlet, 1911), p. 5.

⁷⁰Munro, *The Initiative, Referendum, and Recall* 88; Taft, quoted in Wilcox, *Government By All the People* 213; Borah, *American Problems*, ch. xv; Bird and Ryan, *The Recall of Public Officers . . . in California* 12; Merriam, *American Political Ideas 1865-1917*, 196.

⁷¹Merriam, *American Political Ideas 1865-1917*, pp. 193, 195, 196.

⁷²Wilcox, *Government By All the People* 215.

⁷³Clark, *Government By Judges*, Sen. Doc. No. 610, 63rd Cong. 2nd Sess. ser. no. 6596 (1914), p. 69.

⁷⁴Ettrude, *The Power of Congress to Nullify Supreme Court Decisions* 6; Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 76.

⁷⁵Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 69.

⁷⁶Bird and Ryan, *The Recall of Public Officers . . . in California* 347; Barnett, *Operation of the Initiative, Referendum and Recall in Oregon* 202-6.

vision in Oregon, concluded that the democratic character of the recall was more responsible for its popularity than the actual results attained.⁷⁷ Thus one might infer that adoption of the recall for federal judges would provide the electorate with a fairly harmless weapon which, because of the mere satisfaction of having it, would serve to quiet the clamor for a more radical measure; but the shortcomings of the plan apparently would make it ineffective in regard to the power of the courts over constitutional questions.

THAT JUDICIAL DECISIONS SHOULD BE SUBJECT TO RECALL

The referendum as applied to judicial decisions was first advocated vigorously by ex-President Theodore Roosevelt in 1912.⁷⁸ The proposal was embodied in the Progressive platform of that year, which said that the power of the courts should be restricted to leave to the people "the ultimate authority to determine fundamental questions of social welfare and public policy."⁷⁹ This was to be accomplished by providing that in case acts of state legislatures in exercise of their police power should be held unconstitutional by the state courts, the people should have a chance to vote on the issue after a lapse of reasonable time. The United States Supreme Court was not to be affected by this limitation. Colorado was the only state to respond, and its law of 1913 provided for a sixty-day interval before a constitutional opinion took effect. If, in that time, a petition were circulated and signed by five per cent of the voters, an election should be held within ninety days to give the people a chance to override the decision.⁸⁰ But in 1921 the supreme court of that state decided that this amendment conflicted with the federal constitution and was consequently void.⁸¹

The arguments for the recall of decisions are few. They include the insistence that the people are entitled to the final voice on decisions involving issues vital to them,⁸² and the negative contention that the ordinary process of amendment is too slow

⁷⁷Barnett, *Operation of the Initiative, Referendum and Recall in Oregon* 218. Likewise, in Vermont where the tenure of judges is least secure, the courts have exercised their judicial prerogative fearlessly. Goodnow, *Social Reform and the Constitution* 340.

⁷⁸Merriam, *American Political Ideas 1865-1917*, p. 189.

⁷⁹Porter, *National Party Platforms* 337.

⁸⁰Bird and Ryan, *The Recall of Public Officers . . . in California*, p. 16; Munro, *Initiative and Referendum*, 8 *Encyc. Soc. Sciences* 52.

⁸¹*People v. Western Union*, (1921) 70 Colo. 90, 198 Pac. 146.

⁸²President Theodore Roosevelt, quoted in Ransom, *Majority Rule and the Judiciary* 6.

⁸³See Merriam, *American Political Ideas 1865-1917*, p. 189.

and difficult and makes possible the thwarting of a simple majority by a strong minority.⁸³ In opposition, we find the arguments that this plan in practice would destroy the constitution by laying it open to ill-considered attacks arising amid "momentary clamor;"⁸⁴ that it would wreck the entire legal system by removing the stabilizing effect of unchallenged precedents;⁸⁵ that in view of the number of opinions involving constitutionality this device would be worn out by too frequent use;⁸⁶ and that it would cause judges to ask the advice of politicians concerning the popular temper before deciding a case.⁸⁷ Additional and unique objections were raised by Stimson. He first claimed that it would be retrogressive, a return to methods used of old but later abandoned, and then he raised the question of just what would be recalled. For example, the opinion in *Lochner v. New York* was based, he said, upon principles embodied in the Magna Charta, the fourteenth amendment, and the New York constitution. Would recall of that decision then invalidate all of those documents?⁸⁸

Perhaps the practice of the ordinary referendum, where it has been used, might yield a clue as to its probable effect if applied to judicial decisions. When a law is to be voted upon usually only about half of the voters register, which makes it possible for a minority of the whole electorate to control the outcome.⁸⁹ Would it be otherwise if applied to court decisions, and is the average citizen adequately versed in the law to arrive at a wise decision? Of course, if decisions involving major policies rather than legal technicalities were the only ones submitted to a vote, the people would at least think they knew what they wanted and vote accordingly. Nevertheless, the application of the plan to the federal judiciary would undoubtedly require a constitutional amendment, since it would be a restriction on procedure rather than on jurisdiction.⁹⁰ Then to the extent that it did curb the judiciary it would be more negative than positive; some confusion of the law would undoubtedly follow; and if the referendum revision were too easily effected, the resulting extreme facility of amending the

⁸⁴Taft, *The Recall of Decisions* (Pamphlet, 1913), pp. 5-9.

⁸⁵Taft, *The Recall of Decisions* (Pamphlet, 1913), p. 23.

⁸⁶Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 69.

⁸⁷Taft, *The Recall of Decisions* (Pamphlet, 1913), p. 22.

⁸⁸Stimson, *Certain Retrogressive Policies of the Progressive Party*, (1913) 7 Am. Pol. Sci. Rev. 160; *Lochner v. New York*, (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937.

⁸⁹Munro, *Initiative and Referendum*, 8 Encyc. Soc. Sciences 52.

⁹⁰See footnote 34.

organic law might soon shatter the Constitution beyond recognition.

THAT THE PRESIDENT AND SENATE SHOULD "PACK" THE COURT

It is clearly within the power of Congress to determine the number of federal judges, so the size of the Supreme Court could be and has been expanded as Congress saw fit.⁹¹ This places within the hands of a given administration the means to "pack" the highest tribunal. Consequently President Roosevelt's proposal to appoint an additional justice to work alongside each one who failed to retire at the age of seventy⁹² immediately provoked the charge that he was packing the Bench, that he was trying to change umpires in the middle of the game. First, it must be observed that to "pack" the judiciary may have two definitions. By the first it means that the President would appoint mere political puppets, "yes-men," who by some sense of obligation to the executive would follow his bidding and uphold specific statutes regardless of their own conscientious interpretation of the constitution. By the second it means that the president would choose for the additional justices men whose past records indicate that they might reasonably be expected to interpret the constitution in a way that would facilitate its further expansion in a manner that would be in general harmony with the New Deal interpretation of it already approved in some dissenting opinions of the minority on the bench.⁹³ The first definition connotes a preposterous perversion of American constitutional government, and if there was any justification for the suspicion that the president and Senate were in collusion to pack the courts with supine puppets, the outcry against the proposal was deserved. Yet that overlooks the fact that in the past the Senate has taken seriously its power of confirmation, especially when it seemed that the president was trying to force acceptance of his nominees, and the president himself has vigorously repudiated that definition of "packing" as unworthy of any presi-

⁹¹The number of Supreme Court justices has varied, as follows: six in 1789, five in 1801, seven in 1807, nine in 1837, ten in 1863, seven in 1866, and nine since 1869. 1, 2 Warren, *The Supreme Court in United States History* passim; *The Pathfinder*, Feb. 29, 1937, p. 11.

⁹²Provided also that total number of appointments to the federal courts should not exceed fifty, and that the number of Supreme Court justices should not exceed fifteen. *Moves on Supreme Court, and Full Text of Proposed Law*, *Kansas City Star*, Feb. 5, 1937. The American Bar Association vote was 6 to 1 against this feature of the President's plan. *Kansas City Times*, Mar. 12, 1937, p. 6.

⁹³President Roosevelt's radio address, March 9, 1937.

dent and Senate fit for their offices.⁹⁴ Pursuit of such a course would undoubtedly bring political suicide to the party responsible for it, hence in the further consideration of packing the Court the second definition will be accepted.

In the debate over this proposal at least three points of view have appeared:

(1) That the federal judiciary is America's one great non-partisan governmental agency; to legislate a change in its composition is not only to establish a dangerous precedent but also to undermine the foundations of American checks and balances.⁹⁵

(2) That the Supreme Court has been and is packed, and that the present move is designed merely to "unpack" it.⁹⁶

(3) That in the last analysis as long as the independence of judgment of the justices remains unimpaired, it is not possible to pack the courts with any assurance of unqualified success.⁹⁷

To evaluate these divergent views requires a brief review of the history of the federal judiciary.⁹⁸ First, the number of justices on the Supreme Court has been changed six times in the course of American history⁹⁹ and since 1789 Congress has frequently exercised its power to establish and enlarge the inferior courts. In one sense, the first federal judiciary was "packed" by President Washington, who laid down the rule that he would not knowingly appoint to the offices at his command, including the judiciary, men "whose political tenets are adverse to the measures wch [sic] the general government are pursuing."¹⁰⁰ Subsequently President John Adams appointed John Marshall Chief Justice and named other Federalists to fill the sixteen judicial posts created in the closing days of his administration. President Jefferson's effort

⁹⁴President Roosevelt's radio address, March 9, 1937. Concerning the past exercise of the Senate's power of confirmation, see *The Supreme Court Under Fire*, (1930) 62 *New Republic* 30, 31; Hacker and Kendrick, *The United States Since 1865*, pp. 561, 625; Lingley and Foley, *Since the Civil War* 742; Munro, *The Government of the United States* 187, 280; Garner, *Political Science and Government* 798.

⁹⁵Dorothy Thompson, in *Kansas City Star*, Mar. 12, 1937, p. 8; Senator Bennett Clark, *Kansas City Star*, March 14, 1937; and others *passim*.

⁹⁶Judge Devaney, *Kansas City Star*, March 12, 1937, p. 1; Professor Corwin, *Kansas City Star*, March 17, 1937, pp. 1, 10; *The Pathfinder*, Feb. 20, 1937, p. 14; and so forth.

⁹⁷*The Pathfinder*, Feb. 20, 1937, p. 14; Attorney-General Cummings, *Kansas City Star*, March 10, 1937, p. 1; Senator Wheeler, *Kansas City Times*, Feb. 22, 1937, p. 1; and so forth.

⁹⁸For general references on the subject of this and the succeeding paragraph, see footnote 1; also Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230.

⁹⁹See footnote 91.

¹⁰⁰4 Channing, *History of the United States* 51-6.

to "unpack" these courts by impeachment was thwarted by the Senate,¹⁰¹ and Chief Justice Marshall fortunately remained in office to give the constitution the federalist interpretation until 1834. Thenceforth to the Civil War a series of Democratic administrations packed the Court with state's rights men and this Court rendered the consequential Dred Scott opinion in 1857. Then the Republicans sought to repack it in 1867 in favor of their reconstruction program.¹⁰² President Grant did name friendly appointees to fill two vacancies in 1871, and the Legal Tender decision of 1870 was then reversed.

Since 1869 the size of the Court has not been changed, and the tradition has been created that no further changes should be made. In this period the persistence of previous partisan affiliation of the justices was again demonstrated when during the contested election of 1876 the five justices of the Supreme Court, who had been selected to make the election commission "impartial," voted on all counts according to their known partisan inclinations. Their division three-to-two gave the commission an eight-to-seven Republican majority, and all twenty disputed electoral votes were given to Hayes. Another relevant point is that from 1921 to 1933 three successive Republican presidents named eight justices to the Bench,¹⁰³ so in that way of looking at it the Court has been packed again, even if not deliberately. And now there is little hope of repacking it soon without increasing the number of justices.¹⁰⁴ After the annulment of the NRA it was reported that President Roosevelt had firmly refused to consider proposals that the Court be packed,¹⁰⁵ but in the succeeding two years he seems to have resolved that the combined retirement-enlargement proposal that passed the House in 1869 and was recommended by Attorney General McReynolds in 1913 was the "most conservative" and immediate means of bringing the judiciary into harmony with the other two branches of the government.¹⁰⁶

¹⁰¹See text at footnote 60.

¹⁰²Harper's Weekly openly advocated packing the Court. Orth and Cushman, *American National Government* 491-4.

¹⁰³Editorial, *Review of Reviews*, March 1937, p. 26. It should also be recalled that nearly all of the present incumbents participated actively in politics prior to their appointment. Court Issue Hazy; *Kansas City Star*, Feb. 22, 1937.

¹⁰⁴The normal life expectancy of the youngest of the justices, age 61, is 13 years, and of the eldest, age 80, is 4 years. *Muncie, Ind. Evening Press*, Sept. 6, 1936, p. 6.

¹⁰⁵*New York Times*, Jan. 13, 1935, No. 2, at p. 3; Jan. 31, 1935, No. 2, at p. 4.

¹⁰⁶Moves on Supreme Court, and Full Text of Proposed Law, *Kansas*

Nevertheless, this attempt to follow the precedent of George Washington¹⁰⁷ might not succeed now as well as then. Justice McReynolds, the appointee of President Wilson, a "liberal," became one of the more conservative men on the Bench, while Chief Justice Hughes, named by President Hoover, a "reactionary," has been liberal more often than conservative.¹⁰⁸ So it seems reasonable to concede that as long as the justices, conditioned by years of legal training and experience, have complete independence after appointment, they will naturally interpret the constitution on the basis of precedent and obvious authority in a given case, with the result that a bench of fifteen liberals might nearly as often be divided eight-to-seven against the administration as one of nine has been divided five-to-four.¹⁰⁹

This past history of the Court provides the basis for the conclusion that there is some merit in each of the three contentions mentioned previously, as follows:

(1) The Court is an independent, non-partisan agency in the main, yet in some crucial cases the previous partisan affiliation of the justices seems to have conditioned their opinions. But since neither the purposely nor the inadvertently packed courts of the past have become fully subservient to the other two branches, nor have they disregarded the main body of American individual liberties, it does not necessarily follow that another change in the composition of the Court would be cataclysmic. Yet if the present deliberate effort should succeed too well, the practice might be followed by administration after administration, creating even greater confusion of legal precedent than already prevails, and finally reducing the federal judiciary to a political toy. This contingency provides the legal profession with its chief cause for protest, and also suggests the advisability of effecting this revision only by amendment, even though Congress clearly has the power to enact it.

(2) Again, since the Court has been packed before and may even now be partially packed, this proposal may be explained as an effort to unpack it in order to bring it into harmony with the interpretation of the constitution held by the other two branches. On

City Star, Feb. 5, 1937; President Roosevelt's radio address, March 9, 1937; The Pathfinder, Feb. 20, 1937, pp. 3, 4, 11.

¹⁰⁷See footnote 100 and text.

¹⁰⁸See Court Debate at Church, Kansas City Times, Feb. 15, 1937.

¹⁰⁹Senator Wheeler, Kansas City Times, Feb. 22, 1937; Attorney-General Cummings, Kansas City Star, March 10, 1937; The Pathfinder, Feb. 20, 1937, p. 14.

this score the New Dealers, including farm and labor organizations, hail this move hopefully, while the propertied interests use all agencies at their command to oppose or delay a change that might facilitate the renewal of New Deal regulation.

(3) Yet even packed courts of the past have been fairly independent, and there is nothing in this proposal to obstruct the independence of judgment of even the future liberal appointees. So there is at least a small chance that even a predominantly liberal Court would find a new NRA or AAA unauthorized by the Constitution. Should this eventuality come to pass, it would mean also that this packing was not fully successful and that consequently the alarm provoked by the first contention above and the optimism found in the second were not fully justified.

If one is able to close his ears to the din of this partisan debate, he may fairly conclude that this proposal is neither dreadfully dangerous nor certainly constructive. This leaves then its expediency as its chief defense, for it can be tried now without waiting ten or twenty years for the agreement upon and adoption of an amendment. If in that trial it should have moderate success, this move would then be recorded as having been a constructive aid in the evolution of American constitutional democracy; but if it should succeed absolutely, some check would have to be devised, probably by constitutional amendment, to limit further packing of the judiciary; or if it met with poor success, some of the powers sought by the present administration would yet have to await approval by amendment. Since most of the real arguments pro and con are *anticipatory*, there is little wonder that this proposal has evoked wide diversity of opinion.

THAT LAWS SHOULD BE ANNULLED ONLY BY AN EXTRAORDINARY MAJORITY

Since in some crucial cases laws have been held unconstitutional by a five-to-four vote of the Supreme Court, an act of Congress to require that it be done only by an extraordinary majority has been a widely discussed proposal. Resolutions to provide for this change in procedure were introduced in each Congress during the 1820's and have been presented at frequent intervals since, particularly in the years following the Income Tax (1895) and second Child Labor (1922) decisions, and again when New Deal statutes were avoided.¹¹⁰ The proposals are similar in intent and sub-

¹¹⁰Beard and Beard, *The American Leviathan* 135; Buell, *The Supreme*

stance but vary in detail. Some would require six or seven or eight of nine votes to annul a law on constitutional grounds, while others would require a unanimous vote, or would put through an amendment specifically requiring Congress to fix the number as it saw fit. One or the other of these plans has been adopted in the states of Ohio, North Dakota, and Nebraska.¹¹¹

Perhaps the strongest argument in favor of requiring an extraordinary majority in federal courts is that it would prevent decisions of unconstitutionality when there was a "reasonable doubt." The Supreme Court itself has said in dicta of past opinions that if there was any doubt as to the unconstitutionality of a law the will of the legislature should prevail, and the narrow margins in five-to-four decisions, especially when wavering and contradictory as in the two Income Tax cases, allegedly were evidence that the Court was not following its own precept.¹¹² To many, another good feature of this plan is that it stands at least a small chance of being effected without amending the constitution,¹¹³ and supporters of this contention sometimes cite as a favorable precedent the decision of the Supreme Court in 1930 that Ohio's requirement of an extraordinary majority did not violate the "due process" and "republican form of government" clauses in the federal constitution.¹¹⁴ The advocates also maintain that this plan would preserve the good features of judicial review;¹¹⁵ that many good laws would have been saved by it in the past;¹¹⁶ that in highly im-

Court in United States History, (1922) 17 Current History 230; Buell, *Reforming the Supreme Court*, (1922) 114 Nation 715; 2 Cong. Digest 271-8; Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), pp. 71, 74; Boulder, Colo., Camera, June 18, 1935, p. 2; The Pathfinder, June 1, 1935, p. 8; S. J. R. 149, H. R. 7997, 8054, 8100, 8123, 8168, and 10196, and H. J. R. 287, 74th Cong. 1st and 2nd Sess.

¹¹¹Maddox, *Minority Control of Court Decisions in Ohio*, (1930) 24 Am. Pol. Sci. Rev. 638.

¹¹²Mr. Justice Waite, in *Munn v. Illinois*, (1876) 94 U. S. 113, 24 L. Ed. 77, cited in Buell, *The Supreme Court in United States History*, (1922) 17 Current History 230; *Ogden v. Saunders*, (1827) 12 Wheat. (U.S.) 213, 6 L. Ed. 606, and income tax cases cited in Clark, *Government By Judges*, Sen. Doc. No. 610, 63rd Cong. 2nd Sess. ser. no. 6596 (1914); Rep. McSwain in 2 Cong. Digest 276; Orth and Cushman, *American National Government* 570; *Sinking Fund Cases*, (1879) 99 U. S. 761, 25 L. Ed. 504, in Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 64; Ramsay, in 79 Cong. Rec. 7729, 7730, (1935).

¹¹³Ramsay, in 79 Cong. Rec. 7729, 7730 (1935); Senator Borah, in 2 Cong. Digest 277; Buell, *The Supreme Court in United States History*, (1922) 17 Current History 230.

¹¹⁴*Ohio v. Akron Metrop. Park Dist.*, cited in Corwin, *Judicial Review*, 8 Encyc. Soc. Sciences 461.

¹¹⁵Buell, *The Supreme Court in United States History*, (1922) 17 Current History 230.

¹¹⁶Buell, *The Supreme Court in United States History*, (1922) 17 Current History 230.

portant matters Congress is held to a two-thirds rule;¹¹⁷ and that by our present plan one man can exert more power than Congress and the president,¹¹⁸ which has a further bad effect in that at times of constitutional controversy the one justice who turns the tide one way or the other may be sought as a presidential nominee, with possible mischievous influence on the outcome of pending cases.¹¹⁹

In reply to alleged violation of "reasonable doubt," opponents of the extraordinary majority say that the Court has handed down but few five-to-four opinions.¹²⁰ They also refute the claim that Congress has power to regulate the federal courts in that manner, for it would be a restriction on procedure rather than on appellate jurisdiction; and the Ohio case, mentioned above, is not a precedent in interpretation of the federal judiciary article of the constitution.¹²¹ Other charges against it are that it would give the legislature and the executive too much power;¹²² that in five-to-four decisions it is in reality five and not just one that decides;¹²³ that the Court could vote two-to-one against a law and it would still stand, which in turn would weaken that law and the Court in the public esteem;¹²⁴ and that in the final analysis the size of the vote is only a pretext for complaint on the part of those who supported the annulled legislation.¹²⁵

Further unfavorable aspects are revealed in Maddox's study of the operation of Ohio's plan. He found that the influence of the state supreme court in harmonizing decisions of lower courts was destroyed, as to constitutional questions, for the inferior courts did not consider themselves bound by a previous reversal by a

¹¹⁷Ralston, Study and Report for the A. F. of L. (Pamphlet, 1932), p. 65.

¹¹⁸Rep. McSwain, in 2 Cong. Digest 276.

¹¹⁹Walter Lippmann, in Muncie Evening Press, June 13, 1935.

¹²⁰Williams, in 2 Cong. Digest 276. Ten five-to-four decisions in seventy. See footnote 3.

¹²¹Beard and Beard, *The American Leviathan* 135; Ralston, Study and Report for the A. F. of L. (Pamphlet, 1932), p. 71; Warren, Congress, The Constitution, and the Supreme Court 213, 214. Chief Justice Hughes once said, in reference to this proposal, that "It is doubtful to say the least if Congress would have the constitutional authority. . . ." What Mr. Hughes and Mr. Stone Once Said, *United States News*, Feb. 17, 1936, p. 3.

¹²²Mr. Justice Stone, as quoted, see footnote 121; editorial, *Boulder, Colo., Camera*, June 18, 1935.

¹²³Chief Justice Hughes, as quoted, see footnote 121; Grinnell, in 2 *Con. Digest* 277.

¹²⁴Chief Justice Hughes, as quoted, see footnote 121; Williams, in 2 *Cong. Digest* 276; Warren, Congress, The Constitution, and the Supreme Court 217.

¹²⁵Warren, Congress, The Constitution, and the Supreme Court 217.

minority in the higher courts. Thus he concluded that "Litigants may find a law applicable in one jurisdiction while it is void in another . . .," that "No generally accepted body of principles is created," and that "The very basis of our system of law is threatened."¹²⁶ The objections of Maddox, accepted in the main, might be partially obviated if this plan were effective in its more conservative form, requiring a two-thirds majority instead of near unanimity. Even so, some confusion of the law might result, New Deal proponents would have saved few cherished statutes if this requirement had been in effect during recent years, and this device proposes to remedy only one of the causes of popular criticism of the Court.

THAT CONGRESS SHOULD BE ENABLED TO OVERRIDE THE COURT

In an address to the delegates of the American Federation of Labor in convention in 1922, Senator La Follette proposed that the Constitution be amended to empower Congress by a two-thirds vote to override an adverse decision of the Supreme Court.¹²⁷ The American Federation of Labor went on record in favor of that revision, and Representative Frear introduced such a resolution in the House.¹²⁸ Then the proposal was written into La Follette's platform of 1924,¹²⁹ and was debated during the campaign,¹³⁰ but La Follette's defeat retired the issue until it was revived following the annulment of the NRA.¹³¹

This plan is favored by some because it is "democratic," it would not completely destroy judicial review, the desired social legislation could then be enacted, powerful minorities no longer need be feared, and it would make legislative bodies the final authority in their own field, which would in turn create greater popular interest in the work of Congress, making that body more careful and conservative.¹³² La Follette urged it because the con-

¹²⁶Maddox, *Minority Control of Court Decisions in Ohio*, (1930) 24 *Am. Pol. Sci. Rev.* 638, at pp. 645-7.

¹²⁷2 Cong. Digest 271; Reprint in 62 *Cong. Rec.* 9076-82 (1922).

¹²⁸2 Cong. Digest 271.

¹²⁹Porter, *National Party Platforms* 519.

¹³⁰A manual for debaters was published: *Etrude, The Power of Congress to Nullify Supreme Court Decisions*.

¹³¹See the title of H. J. R. 277 (1935), 79 *Cong. Rec. Index Volume*. Also see the summary of an article by Professor Thomas Reed Powell, in *Review of Reviews*, Feb. 1937, p. 66.

¹³²Affirmative arguments in *Etrude, The Power of Congress to Nullify Supreme Court Decisions* 6. See also the arguments for elimination of constitutional review, *infra*, p. 506.

stitution was, he said, founded on the principle that "the will of the people shall be the law of the land."¹³³

But this plan really is a short-cut method of amending the constitution, for in effect Congress could do it by a two-thirds vote.¹³⁴ Thus it is open to the criticism that if care were not exercised it would practically end American constitutional government, destroying the Bill of Rights and the protection afforded minorities.¹³⁵ Of course, the legislative bodies of England and France have comparable powers, and Congress, like them, would still be subject to popular control.¹³⁶ Yet there is at least a remote possibility that in a crisis Congress might legally and with popular applause suspend elections and become a closed corporation which in time might assume irrevocable Fascist powers. Consequently, since this plan could be made effective only by an amendment to the constitution,¹³⁷ it is doubtful whether the electorate would consider it worth the risking of a cherished heritage. Another clever though less valid objection is embodied in the question as to how the mere passing of a "bad law twice could make it a good one?"¹³⁸ Of course the answer to that is that Congress does that very thing, with constitutional sanction, whenever it overrides a presidential veto.

The chief support of this plan is that it might be the ultimate and ideal solution for the whole problem if by its adoption American legislative traditions should become improved and stabilized. The arguments against it include one, the possible abandonment of the American form of constitutional government, which practically eliminates further consideration now of this kind of limitation upon the courts, unless the American people should become more inclined than at present toward the adoption of England's form of elastic constitution.

THAT CONGRESS SHOULD RESTRICT THE JURISDICTION OF THE COURTS

Since past interpretation of the constitution¹³⁹ indicates that

¹³³2 Cong. Digest 272.

¹³⁴Orth and Cushman, American National Government 570.

¹³⁵Dawes, in 2 Cong. Digest 275.

¹³⁶Mr. Justice Stone said it would give the acts of Congress undue weight as against the rights of states, unless it were applied to state courts too, and then states and nation would be in rivalry in the extension of constitutional powers in particular fields. What Mr. Hughes and Mr. Stone Once Said, United States News, Feb. 17, 1936.

¹³⁷Orth and Cushman, American National Government 570.

¹³⁸Dawes, in 2 Cong. Digest 275.

¹³⁹See footnote 34.

Congress may not only create and abolish federal courts but also restrict their appellate jurisdiction,¹⁴⁰ it has been suggested that Congress exercise this power. Early in the past century the repeal of the part of the Judiciary Act permitting the federal courts to accept appeals from state courts was advocated;¹⁴¹ and after the Civil War Congress was bombarded with like proposals.¹⁴² That body did pass an act eliminating appellate jurisdiction of the Supreme Court under the Reconstruction Act of 1867. The Court recognized that prerogative of Congress by dismissing the case, but the ensuing criticism of Congress was so severe as to make unlikely the repetition of this particular alternative.¹⁴³ Nevertheless some critics of the federal courts would now abolish the jurisdiction of the latter in that class of cases involving constitutional issues, leaving the courts supreme in the remainder of the field.¹⁴⁴ The Socialists have campaigned for this since 1912, and organized labor has contended for it too.¹⁴⁵ Then in 1935, when the New Deal was being riddled by the Court, William Green of the American Federation of Labor and Secretary of Agriculture Wallace revived this proposal, and resolutions were introduced in Congress to effect it,¹⁴⁶ some by congressional act and some by constitutional amendment.¹⁴⁷

¹⁴⁰Orth and Cushman, *American National Government* 491-4.

¹⁴¹Orth and Cushman, *American National Government* 568; Buell, *Reforming the Supreme Court*, (June, 1922) 114 *Nation* 715.

¹⁴²Buell, *Reforming the Supreme Court*, (1922) 114 *Nation* 715.

¹⁴³The case was *Ex parte McCordle*, (1868) 7 Wall. (U.S.) 506, 19 L. Ed. 264, cited in Orth and Cushman, *American National Government* 494. Also in *The Francis Wright*, cited by Goodnow, *Social Reform and the Constitution* 374.

¹⁴⁴This, on the ground that the power was not intended by the Constitutional Convention, but was usurped by the courts. See footnote 1 and text.

¹⁴⁵Merriam, *American Political Ideas 1865-1917*, p. 191; Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 1; Porter, *National Party Platforms* 367, 471.

¹⁴⁶Editorial, *Muncie, Ind., Evening Press*, June 17, 1934, p. 4; *New York Times*, Jan. 26, 1935, No. 16, at p. 2. Of eight 1935 resolutions, four would eliminate all review in cases involving constitutionality, while four others would reserve the power to review such cases exclusively in the Supreme Court. S. J. R. 149, H. J. R. 287, 296, 301, 329, and H. R. 8054, 9478, and 10128, 74th Cong. 1st and 2nd Sess.

¹⁴⁷Of the four measures to abolish such review, two were bills and two were proposed amendments. The four proposals to lodge the power exclusively in the Supreme Court were similarly divided. See footnote 146. Although the Court once approved a similar legislative limitation on its jurisdiction (see footnote 143), many who consider this suggestion anticipate that it would now have to be adopted through amendment as the present Court would probably reject it as a restriction on judicial power, rather than on jurisdiction. Richter, *A Legislative Curb on the Judiciary*, (1913) 21 *J. Pol. Econ.* 291; Orth and Cushman, *American National*

Advocates of this extreme measure contend that the wording of the constitution indicates that Congress was intended to be supreme in this field; and they maintain that this body is not only responsible to maintain the constitution but is also responsible to the people, and that such responsibility, if usurpation by the Court were ended, would breed care on the part of legislators.¹⁴⁸ Besides, foreign governments get along well without judicial review like ours, and even if the change would place considerable power in the hands of Congress and the president, that power would not be abused, as is testified by the president's discreet exercise of his command of the army and navy.¹⁴⁹ In reply to charges of usurpation, opponents of this plan resort to the usual claim that constitutional review is an inherent function of the judiciary.¹⁵⁰ Then they point out the evils that would accrue. It would mean the "end of the constitution."¹⁵¹ Congress, easily swayed by mass movements, would be less likely to protect the peoples' liberties,¹⁵² the states would all be "vassals" of Washington,¹⁵³ the president would become "a dictator,"¹⁵⁴ and there allegedly would be forty-eight varying constructions of some federal laws.¹⁵⁵ This proposal invokes all the arguments for and against constitutional review, itself, since the whole doctrine is at stake. When it comes to that, those who defend the courts seem to be on firmer ground than their opponents, and the elimination of the faults charged to the present system, with the resultant preservation of the intrinsic merit of judicial review of constitutionality, recommends itself as a better plan of approach.

However, limitations on jurisdiction might include something else instead of a mere elimination of review in a certain class of

Government 569; Goodnow, *Social Reform and the Constitution* 348; Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230; Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 70. Judge Otis has written some interesting comments on the possibilities of evading constitutional limitations, in *It Can Be Done*, *United States News*, Feb. 10, 1935, at pp. 3, 14.

¹⁴⁸Rep. Monaghan, in 70 *Cong. Rec.* 8266, 8565 (1935); Senator Ladd, in 2 *Cong. Digest* 274; Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 73.

¹⁴⁹Ralston, *Study and Report for the A. F. of L.* (Pamphlet, 1932), p. 73.

¹⁵⁰Orth and Cushman, *American National Government* 569.

¹⁵¹Schaffer, in 2 *Cong. Digest* 274.

¹⁵²Warren, *Congress, The Constitution and the Supreme Court* 174-7.

¹⁵³Schaffer, in 2 *Cong. Digest* 274; Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230.

¹⁵⁴Editorial, *Muncie, Ind., Evening Press*, June 17, 1935.

¹⁵⁵Buell, *The Supreme Court in United States History*, (1922) 17 *Current History* 230; Shields, in 2 *Cong. Digest* 273.

cases, so a number of other suggestions have been made.¹⁵⁶ Since the federal courts have shown a tendency of late to go to extremes in their reliance upon the "due process" clauses,¹⁵⁷ and in view of the criticism of that trend by a conservative like Charles Warren,¹⁵⁸ the amendments proposed by Senators Costigan and Borah offhand seem to offer a constructive plan of revision.¹⁵⁹ One would give Congress and the other the states the power to regulate hours, wages, and the practices of industry and commerce, and both propose to limit court construction of "due process" clauses to "the methods or procedure to enforce such legislation" as distinguished from the substance of the legislation itself. In other words, that clause would be restricted to have a meaning more like what was popularly accepted at the time of its enactment.¹⁶⁰ Yet neither proposal would eliminate five-to-four decisions and other grounds for criticism, and the blanket authority in Costigan's amendment while necessary to permit needed social legislation, may not be sufficiently well-defined to prevent possible over-centralization of governmental control.¹⁶¹ Furthermore, this redefinition of due process would deprive the Court of its best weapon for the elimination of excessive and confused regulation of business in the separate states, like that in the era of the Granger laws.

Other plans for limiting the jurisdiction of the courts would provide substitute bodies in an effort to offset the weaknesses that might result from otherwise negative proposals. The editor of the *New Republic* would have us set up an independent "Supreme Planning Council," made up of experts in social and economic management.¹⁶² In matters of policy the rulings of that body would take precedence over court opinions, thereby removing from court jurisdiction a field in which the criticized quasi-

¹⁵⁶The proposal to eliminate the rule of precedent, or *stare decisis*, while constructive in that it would attempt to make the courts interpret the law in the light of the dynamic present rather than on the basis of past decisions, hardly merits consideration, for the rule is so well ingrained that judges probably would be somewhat influenced by it in spite of any written admonition. Merriam, *American Political Ideas 1865-1917*, p. 179; Ralston, *Study and Report for the A. F. of L. (Pamphlet, 1932)*, p. 70.

¹⁵⁷See footnote 5 and text.

¹⁵⁸Quoted in Frankfurter, *The Supreme Court and the Public*, (1930) 83 *Forum* 334.

¹⁵⁹Costigan's proposal, *Denver Rocky Mountain News*, May 28, 1935, p. 8; S. J. R. 3, 74 Cong. 1st Sess. Borah's proposal, *The Pathfinder*, March 13, 1937, pp. 5, 6; An Amendment, in *Kansas City Star*, Feb. 25, 1937.

¹⁶⁰Hacker and Kendrick, *The United States Since 1865*, p. 198.

¹⁶¹Proves Too Much, *Denver Rocky Mountain News*, May 28, 1935, p. 5.

¹⁶²*New Republic*, June 12, 1935, at p. 118.

sociological opinions of the past have originated and in which long-range planning is essential to further progress. Another device, similar in essence, has been proposed by Laski.¹⁶³ Instead of a planning council he would set up administrative courts to consider cases involving the activities of administrative officials in their official capacity. These would be made up of social and economic experts and required to give prompt decisions. He points to the Conseil d'Etat in France, which has shown "the highest qualities of a great court of law" in those extremely technical contemporary problems wherein our own courts can show only an "unhappy" record.¹⁶⁴ But if the people of the United States were to try this plan, and they already have it in a small way in the various governmental commission courts, they would likely insist that this court be an independent body, which incidentally would then be as free to be arbitrary as is the federal judiciary.¹⁶⁵ If either this court or a planning council were to be supreme in their fields, in order not to be subject to overruling by the Supreme Court, to erect either would probably require an amendment of the constitution,¹⁶⁶ and then another problem undoubtedly would arise from the frequently overlapping jurisdiction of the federal courts and the rival administrative agency.

SUMMARY AND CONCLUSION

Judicial interpretation is in some respects beginning to check rather than to aid the further growth of the constitution, and especially is this true when applied to the expansion of national control in the economic and social fields. Although the courts may have been legally right in many cases, even some conservatives have seen in the last presidential election the unofficial ratification of a "new amendment," one that "charges the national government

¹⁶³Laski, *Judiciary*, 8 *Encyc. Soc. Sciences* 465, at pp. 467, 468.

¹⁶⁴Garner's *Study of the French Judiciary*, cited in Laski, *Judiciary*, 8 *Encyc. Soc. Sciences* 465; and Garner, *Political Science and Government* 785-91.

¹⁶⁵There has been committed in the Senate a bill (Senator Logan), S. 3787, that would consolidate the courts of claims, customs, and patent appeals into one administrative court, which would also be given the present mandamus jurisdiction of the District of Columbia Court and the jurisdiction of tax appeals now exercised by the circuit courts of appeals. The new court would be independent and its decisions would be subject to review by the Supreme Court. It would not, however, have jurisdiction in semi-sociological controversies, as sought by Laski. McGuire, *The Proposed United States Administrative Court*, (1936) 22 *A. B. A. J.* 197-202.

¹⁶⁶The establishment of either of these independent tribunals might or might not be interpreted merely as a regulation of and limitation upon the appellate jurisdiction of the federal courts. See footnote 34.

with responsibility for the economic conditions under which our citizens live and work."¹⁶⁷ The first problem then is to determine in what manner the obligations attending that responsibility are to be met, and that decided, the next step is to conclude how the desirable features of that program may be safely but certainly validated by constitutional amendment or enlightened judicial interpretation. A number of plans have been offered, and in the individual consideration of them several questions or criteria of evaluation have been suggested. In the following summary, in which the sixteen proposals are numbered in the order in which they have been discussed, four questions or tests are applied in an effort to arrive at general conclusions. This classification is not absolute, because some of the plans might readily be moved to another column by rejecting or accepting their qualifying provisions noted previously. (The salient features of the reform proposed by President Roosevelt are designated by an asterisk.)

(a) WHICH PLANS WOULD PRESERVE THE ACCEPTED FEATURES OF JUDICIAL FUNCTIONING IN THE AMERICAN FRAME OF GOVERNMENT?

Yes	Doubtful	No
1. Facile amendment	5. Abstract advisory opinions	10. Recall decisions
2. Criticism and education	7. Elect judges	13. Congress override courts
*3. Additional and roving justices	8. Impeach judges	14. Deny courts constitutional jurisdiction
*4. Retirement privileges	9. Recall judges	16. Supreme policy-forming or administrative tribunals
*6. Immediate review	*11. Pack the courts	
15. Redefine due process	12. Extraordinary majority to annul laws	

(b) WHICH WOULD PRODUCE GREATER ELASTICITY IN THE ORGANIC LAW?

Extremely Effective	Moderately or Ultimately Effective	Doubtful (or other purpose)
10. Recall decisions	1. Facile amendment	*3. Additional and roving justices
13. Congress override courts	2. Criticism and education	*4. Retirement privileges
14. Deny courts constitutional jurisdiction	*11. Pack the courts	5. Abstract advisory opinions
16. Supreme policy-forming or administrative tribunals	12. Extraordinary majority to annul laws	*6. Immediate review
		7. Elect judges
		8. Impeach judges
		9. Recall judges
		15. Redefine due process

¹⁶⁷Leonard Ayres, quoted and supported with qualifications, in editorial, *Kansas City Star*, Dec. 27, 1936. Naturally, the President would interpret the election as "mandate" to act "now." Radio address, March 4, 1937. It is not within the scope of this article to investigate and determine whether the conclusion is absolutely justified that the last election constituted a

(c) WHICH WOULD EXPEDITE JUSTICE?

Extremely Effective	Moderately or Ultimately Effective	Doubtful (or other purpose)
5. Abstract advisory opinions	*3. Additional and roving justices *6. Immediate review 15. Redefine due process 16. Supreme policy-forming or administrative tribunals	1. Facile amendment 2. Criticism and education *4. Retirement privileges 7. Elect judges 8. Impeach judges 9. Recall judges 10. Recall decisions *11. Pack the courts 12. Extraordinary majority to annul laws 13. Congress override courts 14. Deny courts constitutional jurisdiction

(d) WHICH COULD BE EFFECTED WITHOUT RESORT TO A CONSTITUTIONAL AMENDMENT, IF EXPEDIENCY BE CONCEDED DESIRABLE?

No Amendment Required	Doubtful	Require Amendment
2. Criticism and education *3. Additional and roving justices *4. Retirement privileges *6. Immediate review *11. Pack the courts	12. Extraordinary majority to annul laws 14. Deny courts jurisdiction 16. Supreme policy-forming or administrative tribunals 5. Abstract advisory opinions	1. Facile amendment 7. Elect judges 8. Impeach judges 9. Recall judges 10. Recall decisions 13. Congress override courts 15. Redefine due process

Those whose chief interest in these projected revisions is expressed by any one of these questions alone will be inclined to reject or accept upon the basis of that single test, but sound conclusions must be based upon a synthesis of the four concepts or a comparison of the first columns under (a) and (d) with the center and right columns under (b) and (c). Once more it becomes clear that the chief issue is that of expediency against the long-range view. The president's plan scores well in all respects under the fourth test, or expediency, and its doubtful features under the second and third are immaterial; but the

mandate to the administration, to legislate its social and economic objectives into effect, and whether the trends in American life require greater federal control, as held by most economists and sociologists. Instead, it is assumed that the virtue of elasticity in the organic law in the past century means that continued elasticity is desirable, preferably by judicial interpretation, in so far as is possible.

questionable aspect of the "packing" feature under the first criterion might, if carried into effect with extreme success, require later constitutional limitation upon resort to it. Some say that for that reason this feature should not even be enacted; others maintain that it can be tried with no more danger than has attended previous experience with packed courts. Only by actual trial of it could the accuracy of either contention be determined.

When the perplexed layman scans the list for further devices that are certain to be effective and are clearly within the powers of Congress, he finds no solution for the problem. Of course, if resort must be had to amendment, everything on the list becomes available for consideration and a number of promising combinations might then be arranged. However, any amendment affecting the courts would face the vociferous opposition of the groups that now decry President Roosevelt's attack, and adoption could come only after a long-fought nation-wide contest in which both the courts and the sponsoring administration would again be exposed to the abuse characteristic of such campaigns.

While the prospect of revising court powers by changing the organic law is being considered, at least two other alternatives should be kept in mind. One is that by means of a similar campaign an amendment might also be sought giving Congress blanket power to legislate most Democratic objectives into effect. But a delegation of broad power so far-reaching would threaten the abolition of the remaining good features of American dualism; consequently this alternative in fact would probably call for a series of campaigns that would attempt to obtain the ratification of one amendment after another. After several decades Congress probably would be delegated the clearly defined power to legislate on a national scale in several economic and social fields wherein the need had by then become so obvious that minority resistance had finally been overcome. That prospect reverts one's attention to the fundamental problem of the elasticity of the present constitution. Judicial interpretation has made possible the long preservation and application of an organic law written in general terms. This elasticity of interpretation President Roosevelt would revive immediately by exercise of the powers residing in the chief executive and Congress. If his proposal should be defeated because of the fear that it might prove unsound in other respects, an amendment affecting the power of the courts might then be sought. Rather than take that issue into the national arena again, and rather than

postpone solution of the conceded pressing problems of the nation pending the tardy adoption in the remote future of a series of amendments, another, or the second, alternative merits consideration.

If the recent disagreement of the Court and Congress definitely means that the constitution is now too inflexible to permit application by interpretation to modern and future needs, clear and timely delegation of powers to the federal government, as needed, seems preferable to any serious impairment of the functions of the judicial branch.¹⁰⁸ But if a series of intricately defined amendments must then be appended to the national constitution, making it comparable to many of the state constitutions, an amendment might first be adopted to effect greater facility of the amending process itself, which is already an accepted feature of state practice. A requirement that future amendments be ratified by a popular majority, comprising also a majority of the states, probably would facilitate a more timely delegation of powers to Congress, if and when needed, without making the organic law too vulnerable to minority pressure and popular caprice. At the same time the subsequent amendments would serve as a clear mandate to the judiciary in its consideration of cases involving national policy in those fields of legislation.

¹⁰⁸This was written before the announcement on March 29 that the Supreme Court had reversed its recent decisions concerning some state police powers and one national power. Those reversals may hearten the conservatives who contend that this more liberal interpretation has destroyed the best argument for the president's proposals, but they also offer convincing evidence that the social and economic legislative policies in states and nation have little chance of attaining stability when subject to review by a vacillating Court. Consequently the concluding alternative presented here seems yet to have some merit.